IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), GATEMBU & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 16 OF 2017

BETWEEN

PON.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence of the High Court at Nairobi (S. N. Mutuku, J) dated 10th March, 2016

in

H.C.CR.C. No.58 of 2013)

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JUDGMENT OF THE COURT

The appellant, **PON** was sentenced to death by the High Court for having caused the death of **MAN** on 6th January, 2008 at Maalek Hotel and Lodging, Githurai 45 within Nairobi County.

The prosecution's case against the appellant was built around the evidence of 11 witnesses, the combined effect of whose evidence was that after being introduced to each other by a mutual friend in 1999, the appellant and the deceased developed a relationship that culminated in the form of marriage known in common parlance as *"come we stay"* and were, for all intents and purposes regarded as man and wife.

It was further the case for the prosecution that the two had 2 daughters.

There were disagreements in their marriage which was traced to 2002 when the appellant, who was an officer of the defunct Kenya Army now Kenya Defence Forces was deployed to Sierra Leone for a Peace Keeping Mission leaving behind the deceased who was pregnant with their second child. Upon his return in 2004, the appellant is alleged to have left to an unknown place with their first daughter, **M**. That was the last time the girl was seen. Following this incident the deceased made a report to the area Chief and thereafter she left her matrimonial home to go to Eldoret where she lived with her sister J (PW1).

In 2007, with the help of FIDA, the deceased filed a suit in the Children's Court for the custody of **M**. On 30th December, 2007 the deceased had accompanied the process server to Kahawa Barracks where the appellant was working at the time to present to him some court documents. After that meeting, their relationship seems to have taken a positive trajectory as the two agreed to reconcile their differences and move back in together.

Following this reconciliation, the deceased travelled to Eldoret where she had relocated after disagreeing with the appellant. She packed her belongings and returned to Nairobi. On 7th December, 2007, the deceased and her daughter, **C,** in the company of C (PW3), the deceased's friend went to a house believed to be the appellant's at Kahawa Wendani where they found the appellant. The deceased maintained constant communication with J and C through their cellphones until the night of 6th January 2008 when J got a message from the deceased that her phone was out of order, after which she could not be reached. The search for the deceased began on 10th January 2008 when J sent C to the house in Kahawa Wendani where the appellant lived with the deceased. When C visited the house the next day, she found it locked. Two days later, on 13th January 2008, C returned to the house and found that it had been occupied by a new tenant.

About a month later on 11th February, 2008 J, still not having heard from the deceased, came to Nairobi to look for her. The next day, with her cousin, A (PW4), they went to the appellant's place of work at Kahawa Barracks. They were surprised when the appellant denied knowing them or even the deceased. The two later filed a missing person report at Kasarani Police Station. Through police intervention J, A and C learnt that there had been a recovery of an unidentified female body at Maleek Hotel in Githurai and that the body had been moved to the City Mortuary. At the mortuary, their fears were confirmed as they positively identified the body as that of the deceased.

Dr. Peter Muriuki Ndegwa (PW7) who conducted the post mortem examination of the body of the deceased noted multiple massive wounds on the deceased's face and upper limbs, a displaced skull fracture accompanied by inter-cranial hemorrhage. From the injuries, the doctor formed the opinion that the deceased died as a result of multiple organ injuries due to sharp force trauma. In the course of investigations, it was found that a few days after the deceased disappeared, a withdrawal of Kshs. 8,000 was done from her account with Equity Bank. Through CCTV, it was established that the withdrawal was by a male, whose identity could not be ascertained.

In his unsworn defence, the appellant conceded that after his friend in Eldoret introduced him to the deceased and they become friends, they cohabited; that the deceased "had two children" who were 9 and 5, respectively in 2008 when the deceased died; that while serving in Sierra Leone the deceased complained that he was too far for their relationship; and that in 2001 the deceased took a personal decision to move out. The appellant confirmed that he was served with court papers and was preparing to attend court when the deceased informed him that she had withdrawn the case. He admitted also that on 7th December, 2007 the deceased and C visited him at Kahawa seeking his assistance in settling down; that the deceased and C, who were engaged in a joint venture were able to get a house which he helped them to furnish.

In January,2008, he was summoned by the Commanding Officer who was with Judith and A and were inquiring into the whereabouts of the deceased. He informed them that he last saw the deceased when she and C were renting the house. He was once more summoned by the Commanding Officer, Military Police who was again with J and A, still looking for the deceased. He maintained to them that he had not seen her.

Shortly after that meeting, he left Nairobi on 15th February, 2008 to go to his rural home to engage in business after his tenure in the military came to an end. He remained in the village until 2013 when he returned to Kahawa Barracks as a former soldier to seek placement as a retired servicemen. It was while he was there that he learned that the police had been looking for him on allegations of murder. When he got to Kasarani Police Station, he was arrested and subsequently charged.

This evidence was initially placed before Muchemi, J. who was subsequently transferred to another station after hearing three (3) out of the eleven (11) prosecution witnesses. It was from her that Mutuku, J. took over the conduct of the trial. After hearing evidence from the rest of the witnesses, the learned Judge framed 3 issues for determination, first, whether the death of the deceased occurred through an unlawful act or omission; whether it was the appellant who caused the deceased's death; and third, if the former issue is in the affirmative, whether the appellant possessed malice aforethought.

Dealing with the first two issues, the learned Judge, after reviewing the evidence came to the conclusion that it was, without a doubt that the deceased died as a result of multiple wounds inflicted on her by an assailant.

On the second and third issues, the learned Judge came to the conclusion that the appellant, with malice aforethought, caused the death, based on his behavior prior to the disappearance of the deceased and after her death; that the disappearance of the child **(M)** was the reason for separation of the appellant and the deceased and could have as well formed the motive for the murder. In her view, therefore, all the elements of murder were proved beyond reasonable doubt. In the result, the appellant was convicted and sentenced to death in accordance with **section 204** of the Penal Code.

This finding aggrieved the appellant who has filed a memorandum of appeal complaining that the learned Judge erred by: failing to analyze the entire circumstantial evidence hence failing to find that there was no cogent evidence to sustain the conviction; failing to find that the CCTV images were improperly admitted in evidence; failing to observe that essential witnesses did not testify contrary to **section 150** of the Criminal Procedure Code; failing to give the appellant's unsworn defence adequate consideration; and failing to comply with **section 169(1)** of the Criminal Procedure Code, regarding the contents of a judgment. In a supplementary memorandum it was pleaded further that the circumstantial evidence was not proved beyond reasonable doubt; that **section 200** of the Criminal Procedure Code was not complied with; that investigations were either improperly conducted or were incomplete as there were no finger prints to connect the appellant to the offence; and that **section 106B (4) (d)** of the Evidence Act was not complied with.

Miss Odembo learned Counsel for the appellant highlighted these grounds in her oral submissions before us. She gave the following as examples of evidence she considered contradictory. That C evidence was unbelievable for stating that she took the deceased to the appellant's house on 7th February 2008 yet the deceased died on 6th January, 2008; whether the deceased travelled to Nairobi on 24th November 2007 or 25th November 2007; how it was possible as alleged by J that in September 2014, the deceased was wondering around between Gwasi and Eldoret yet by this time she had already died; whether it was possible that the appellant and deceased cohabited 1999-2002, when in fact the appellant was out of the country during this period.

On the veracity of the evidence as a whole, counsel argued that Samwel Mungai and Noel Andrew Mongare the two members of staff of the hotel where the body of the deceased was found were not called to testify; and that the photographs taken from the scene were not produced in court. It was further submitted that the case was heard by three different Judges being (Lesiit, J, Muchemi, J and Mutuku, J.) without complying with **section 200** of the Criminal Procedure Code.

On electronic evidence, it was submitted that PW11 did not comply with **section 106(B**) of the Evidence Act when he produced the images of the CCTV footage from Equity Bank without the certificate of admissibility.

Lastly, on the authority of the Supreme Court decision in **Francis Karioki Muruatetu & Anor V. R & 5 Others,** Petition No. 15 & 16 of 2015, counsel reminded us that death sentence is not mandatory.

For these reasons, it was counsel's submission that the circumstantial evidence presented did not prove beyond reasonable doubt that the appellant committed the murder and the learned Judge therefore erred in failing to so find.

Mr. Hassan, appearing before us for the respondent opposed the appeal arguing that it is devoid of merit. He dismissed the contradictions in the proceedings as minor and typographical errors as should be obvious from the original transcripts. He also urged us to confirm that **section 200** of the Criminal Procedure Code was complied with. On the argument that some of the key witnesses did not testify, counsel made reference to **section 143** of the Evidence Act, and submitted that there is no set number of witnesses required to prove a fact. According to him, the case was, to a large extent, based on circumstantial evidence and the chain of events left no doubt that the appellant committed the offence. For example, the appellant denied having married the deceased and knowing the deceased's sister and friend who were well-known to him; he escaped after the incident and absconded work for 5 years; he lied that he left employment voluntarily at the end of his service when the truth was that he had deserted service.

Since the production of electronic evidence in question was not objected to, counsel urged us to ignore the objection being raised this late.

Lastly, it was conceded that the death penalty is not mandatory.

This is a first appeal and the duty of this Court has repeatedly been stated. The predecessor of this Court in the case of **Okeno V. Republic** [1972] EA.32 explained this duty as follows:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic [1957] EA36) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (Shantilal M. Ruwala versus Republic [1957] EA 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings, and conclusions. It must make its own finding and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses."**

We intend first to dispose of the fringe but equally important issues. Although s**ection 200** of the Criminal Procedure Code deals with situations where an accused person may be convicted on the evidence partly recorded by one magistrate and partly by another, that section, by dint of **section 201(2)** applies *mutatis mutandis* to trials held in the High Court. The substance of the complaint in this ground is that the first Judge (Muchemi, J) heard and recorded part of the evidence and was succeeded by Lesiit, J when the former ceased to exercise jurisdiction; that the succeeding judge (Lesiit, J) upon taking over the trial did not explain to the appellant his right to demand that witnesses who had testified be resummoned and the hearing recommenced. Likewise, the third judge, Mutuku, J is alleged to have also failed to remind the appellant of this right.

While the record before us appears to suggest that Lesiit, J presided at some point and recorded the evidence of PW3, the true position discernible from the original transcript of the High Court is that only 2 Judges (Muchemi and Mutuku JJ) heard the case. At no point did Lesiit, J handle the case and it is strange that her name should feature in those proceedings.

When Mutuku, J took over from Muchemi, J, who had heard only three witnesses, PW1, PW2 and PW3, the record is clear that the appellant was represented by counsel, Mr. Olando, who stated categorically that it was the position and desire of the defence that the hearing would proceed from the stage reached by Muchemi, J. Mr. Olando addressed the court saying;

> **"It is for mention for purposes of confirming how the case will proceed. It is a partly heard matter and our position is that we will proceed from where the matter had reached I ask we confirm hearing dates as given 10th and 11th December 2014."**

That plea was granted. At no point was an application made for the recalling of the witnesses. Mutuku, J. went on to hear the rest of the witnesses to the end and rendered the now impugned judgment. In view of the clear state of the record as regards the application of **section 200** aforesaid, we have no hesitation in dismissing this complaint.

The second matter for our consideration is whether the learned Judge relied on contradictory evidence. We have set out some of the contradictions in the previous paragraphs and wish only to say the contradictions were immaterial to the matters at the heart of the trial. Whether the deceased's body was found at 7.00 a.m or 10.30 a.m is to make heavy weather of a non- issue. The testimony of C that she took the deceased to the appellant's house on 7th February 2008, when as a matter of fact she had died is nothing but a typographical error. Finally we find no substance in the submission that it was not clear from the prosecution evidence whether the deceased travelled to Nairobi on 24th November, 2007 or 25th November, 2007. We reiterate the holding in **Erick Onyango Ondeng' V R**, Criminal Appeal No. 5 of 2013, in which the Uganda Court of Appeal decision in **Twehangane Alfred V Uganda, Crim. App. No 139 of 2001, [2001, [2003] UGCA, 6** was cited with approval, that;

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."**

This ground too must be rejected.

Section 106B (4)(d) of the Evidence Act deals with receipt of electronic evidence. The appellant's only grievance is that the certificate

required to accompany the report was missing. Before the trial court, it was common factor that images of the CCTV taken at an ATM machine were not clear. For her part, Susan (PW11) who testified on behalf of Equity Bank confirmed that she had never met the deceased or the appellant. She could therefore not tell whose image it was. In any event, the production of that evidence was not objected to. But more significantly, the learned Judge came to the conclusion that although she was satisfied that the person seen in the photograph was not the deceased, it was difficult to conclude that it was the appellant. This ground too fails.

We turn finally to consider the matter at the heart of this appeal; whether there was evidence to the standard required to show that the appellant, with malice aforethought, caused the death of the deceased.

The learned Judge correctly noted that evidence, in its broad classification, can either be direct or circumstantial. The deceased's body was recovered in a hotel room with injuries which the doctor attributed to her death. There was no direct evidence linking the appellant or any other person to those injuries. Though the investigating officer, C.I David Mursoy informed the trial court that when he went to the scene he was received by the hotel manager, Samuel Mungai Mwangi and a watchman, Noel Andrew Mongare and that the latter had witnessed the deceased and her companion check in, the prosecution did not summon the two to testify. Like the trial Judge, we believe that the two would have helped the court with some details of the deceased's companion and how they checked in, what time they checked in and when the companion left. In our view, therefore, the case was assembled entirely on circumstantial evidence. The learned Judge based the conviction on both direct and circumstantial evidence. It was her view that the events upto the point the deceased went with C to the deceased's house prior to her death constituted direct evidence, while events after her body was discovered in a hotel room were circumstantial evidence. We do not understand the reasoning and in any case do not agree with the statement that there was any direct evidence. In its ordinary meaning, direct evidence would be that which directly links a person to a crime; that which is based on an eyewitness account, on personal knowledge or observation. The direct evidence sought in the matter the subject of this appeal is - who saw how the deceased met her death. There is no such evidence hence the recourse to circumstantial evidence. Though not direct, circumstantial evidence, as this Court stated in **Musili Tulo V. Republic** Criminal Appeal No. 30 of 2013,

> **"..... is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics."**

To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are **Rex V Kipkerring Arap Koske & 2 Others** [1949] EACA 135 and **Simoni Musoke V R** [1958] EA 71. In **Rex V Kipkerring** (supra) the court explained that;

> **"In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."**

Simoni Musoke V R (supra) introduced an additional factor to the foregoing, to the effect that before drawing the inference of the accused's guilt from circumstantial evidence the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. Over the years these strictures have been developed further by way of explanation. For example, in the case of **Omar Mzungu Chimera V. R** Criminal Appeal No. 56 of 1998, the Court stated that;

> **It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:**
>
> **(i) the circumstances from which an inference of guilty is to be drawn, must be cogently and firmly established;**
>
> **(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
>
> **(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else"**

These dicta find their origin from an old decision of the House of Lords in **Teper V. R.** [1952] AC 480.

What the prosecution presented as forming circumstantial evidence with which the learned Judge agreed can be summarized as follows: It was the case for the prosecution that there was toxic marital relationship between the appellant and the deceased; that the couple's child **(M)** went missing in the circumstances that pointed to the appellant; that as a result of **M's** disappearance, a suit was instituted against the appellant at Eldoret; that shortly after the deceased disappeared, Kshs. 8,000 was withdrawn from her account; that a man was captured on CCTV footage at an Equity Bank ATM machine; that the appellant denied having been married to the deceased; that he also denied being the father of the two children; that he pretended at reconciliation with the deceased when his only aim was to have the case at Eldoret withdrawn; that the deceased moved to the appellant's house when she returned to Nairobi from Eldoret and lived with him upto the time she died; that the deceased was accompanied by a male to the hotel where she was found murdered; that the appellant absconded from work for 5 years and went into hiding after the incident; that he lied that he had left employment voluntarily at the end of his service when the truth was that he had deserted the military service.

The learned Judge duly guided by the correct statement of the law and appropriate authorities arrived at this determination;

> **"When any of these links or cords of evidence are taken separately, they are mere suspicions but in my considered view, when they are taken together, they form strong evidence that leads to one inescapable conclusion that within all human**

probability, the deceased was killed by the accused and none else.

I have also considered the evidence of Susan Njeri, PW11, who testified and produced images showing that on 14th January, 2008, slightly before midday, someone who, from those images appears to be a man, accessed the account of the deceased and withdrew Kshs. 8,000 from that account using her ATM Card. Susan did not identify the accused as the person in those images and the prosecution did not call evidence to prove the person in those images is the accused. However, Susan was categorical that the person in those images is not the account holder. The evidence of these images is not very helpful to prosecution case but it shows that the person in those images is not the deceased and that the person making the ATM transaction using deceased's card must have had access to her PIN Number. This was about one week after the deceased had died.

I have painstakingly examined the evidence of J, C, A, J and M as well as that of the police officers who testified. It is good evidence. It is corroborative evidence. I find no contradictions in it that may lead to doubt that the accused was involved in the murder of the deceased. As a result, I find that there are no other co-existing circumstances which would weaken or destroy the inference the accused is the person who committed this offence.

It is my finding therefore that the accused committed this crime and that he possessed malice aforethought. His behavior prior to the disappearance of the deceased and after her death point to a guilty mind....

I take the view that the issue of the child and the disagreement surrounding her whereabouts is the reason for the separation of the accused and the deceased and could have as well formed the motive for murder".

With respect, we think the learned Judge applied the wrong yardstick. The above evidence, is in our view inconclusive as she herself alluded several times in the passage set out above. She began by appreciating that the instances enumerated as circumstantial evidence amounted to suspicion, viewed in isolation and that viewed together with others they formed strong incriminating evidence against the appellant. We do not see how that is possible after rejecting the evidence of images of the CCTV as unhelpful to the prosecution case considering the image was not proved to be that of the appellant.

There were many co-existing circumstances or factors which, in our estimation, weaken any inference or suggestion of the appellant's guilt. Although there was no evidence on how ultimately the mysterious disappearance of the child M was resolved, the fact that the deceased reconciled with the appellant, and even relocated back to Nairobi to live with him would suggest that there was no bad blood between her and the appellant at least at that stage. Indeed, in his evidence, the appellant told the court that he was aware of the children case at Eldoret and was in fact preparing to attend court in compliance with the summons when the deceased told him that it had been dropped. It was not a criminal case but one for child custody.

It is apparent from the appellant's own defence that he acknowledged the deceased as his wife and at no time did he deny paternity of the two children. He said;

"He introduced me to M Akinyi. The lady became my friend. She is the deceased in this case. In 2001 she used to complain. In the process of cohabiting she used to complain I was living far from her. In 2001 she decided to leave me (keep distance. I decided to keep off also....M had 2 children, C, 9 years in 2008 and M, 5 years in 2008"

Regarding the alleged desertion of the military service, the learned Judge correctly observed that the circumstances under which the appellant left service was in controversy and that the court **"did not have the benefit of the evidence from the Kenya Defence Forces, especially from the officers of the Military Police..."**

The letter dated 22nd February, 2008 addressed to OCPD Suba District by the Ministry of Defence alluded to the appellant having absented himself and sought to have him arrested both for desertion and in connection with a criminal case. The letter does not disclose when the appellant absconded duty or the nature of the criminal case. Whereas the appellant insisted that he had himself gone to the Barracks as a retired serviceman to see if he could be assigned any duty, the prosecution argued that he was arrested by the Military Police. The appellant for his part stated how while at the Barracks he learnt that he was wanted at Kasarani Police Station. He was given a military Land Rover to take him to the station. That is when at the station that he learnt of the death of the deceased and was arrested in connection with it.

As we have said, the Military Police officer who is alleged to have arrested him did not testify. Apart from his evidence that he presented himself to the police, there is no proof that the appellant was a fugitive on the run. If indeed he was arrested by a Military Police Officer, that Officer's evidence would have revealed where the appellant was found and what he was doing to augment the prosecution's argument that he had gone into hiding. The deceased's death was in January, 2008. It took 5 years to arrest the appellant in 2013. The prosecution ought to have explained the steps they took in tracing the appellant. There was only a one-off visit to his rural home.

In a criminal trial, the evidence presented in proof of a charge is critical. For the prosecution, the evidence, whether direct or circumstantial must show beyond doubt that the person charged was involved in the commission of the offence.

That is what **section 111 (1)** of the Evidence Act demands:

"111(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist.

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

We are of the considered view that the instances of what was presented as circumstantial evidence were below the threshold enunciated in the leading cases we have cited in this judgment, namely **Rex V Kipkerring** (supra), **Simoni Musoke V R.** (supra) and **Omar Mzungu Chimera V. R** (supra). The evidence does not amount to a compelling rational inference of the appellant's guilt. The facts do not lead to one irresistible conclusion that the appellant and no one else could have committed the crime, taking into consideration the natural course of human conduct. The evidence was not compelling, credible or cogent. There was no evidence of the appellant's or the deceased's movement prior to the incident. There was no proof that the appellant and the deceased spent the last hours of the deceased together.

In conclusion, and to reiterate what the courts have stated time without end, no amount of evidence based on suspicion, no matter how strong may be a basis for a conviction. See: **Sawe V. Republic** [2003] KLR 364. Suspicion, even reasonable suspicion is a legal standard of proof not known in our criminal law. Either a fact is proved beyond reasonable doubt or it is not. The appellant may have acted strangely upon his return from Sierra Leone, for instance, walking with a metal bar and sleeping in the guest house yet he had a house. His warmth and attitude towards the deceased may have changed; he may have had little interest in the issue of the lost child; he may even have denied knowing J. But all these only amount to suspicion and not evidence upon which a conviction may be found.

The investigation, to say the least, was inept and wanting. A report was made to the police of body of a female found in a hotel room, the police moved in and removed the body without preserving the scene and conducting forensic investigations of the crime scene. The Investigating Officer confirmed they lifted "sets of fingerprints" but conceded that they were not produced in court.

No one, neither the hotel manager nor the watchman who would have provided relevant vital information were called to testify.

In a case founded on circumstantial evidence, missing links like those we have identified can create sufficient doubt which in turn will entitle the court to acquit for lack of evidence to the standard required.

For all these reasons, we are of the opinion that the conviction of the appellant was unsafe and cannot be sustained. He must get the benefit of doubt. Accordingly, the appeal is allowed, the conviction is quashed and sentence set aside. The appellant will be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 7th day of June, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR